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## PACIFIC WORLD DESTINATION EAST SDN BHD v. NGIAM GEOK MOOI & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-81-07-2014]
18 MAY 2015

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***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Industrial Court – Industrial Court disallowing summary dismissal of Regional General Manager on grounds of insubordination – Whether Industrial Court committed error warranting decision being quashed by certiorari – Whether decision of Industrial Court unreasonable in "Wednesbury" sense – Whether certiorari should be granted*

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***CIVIL PROCEDURE:*** *Judicial review – Principles – Whether judicial review not confined to process but also includes review of substance – Whether judicial review court may enquire into merits and substance of decisions*

D

***LABOUR LAW:*** *Employment – Termination – Insubordination – Regional General manager summarily dismissed on grounds of insubordination – Nature and limit of employee's duty to obey orders of superior – Whether insubordination strikes at root of employment contract – Whether serious enough to justify summary dismissal – Test for determining whether employee should be dismissed – Whether punishment of termination proportionate – Whether Industrial Court committed error warranting its decision being quashed by certiorari – Industrial Relations Act 1967, s. 20(1)*

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***LABOUR LAW:*** *Employment – Termination – Proportionality – Whether punishment of termination proportionate – Test of reasonable employer in British Leyland UK Ltd v. Swift*

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The first respondent was employed by the applicant as its Regional General Manager for Malaysia and Brunei. She was also a director of the applicant company. On 30 December 2009, the first respondent was summarily dismissed from her employment on the grounds of insubordination to orders given by her superior. Three instances of insubordination were alleged by the applicant were as follows: (i) the outright refusal of the first respondent to pay a company related expense or claim; (ii) the first respondent's refusal to adjust the budget; and (iii) the first respondent's email expressing her ironclad intention that she would not report to Manuel Ferrer who was the first respondent's direct regional superior. Subsequent to her dismissal, the first respondent made a representation for reinstatement pursuant to s. 20(1) of the Industrial Relations Act 1967 ('IRA') and the dispute was referred for adjudication to the Industrial Court ('the second respondent'). The second respondent found that the first respondent had committed misconduct on a single ground of insubordination but nevertheless held that the punishment of termination from service was not proportionate under the circumstances.

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The applicant thus sought judicial review to quash the second respondent's decision given in the first respondent's favour. The issue arising for determination was whether the second respondent had committed any error which warranted its decision being quashed by *certiorari*.

**Held (allowing applicant's application with costs):**

**(1)** The grounds upon which administrative action is subject to control by judicial review has been widened. The court's review is not confined to process but also substance; *R Rama Chandran v. Industrial Court of Malaysia & Anor* (refd); *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* (refd); *Ambank (M) Bhd v. Menteri Sumber Manusia & Anor and Other Appeals* (refd). (paras 19 & 20)

**(2)** The court in cases of this nature exercises supervisory and not appellate jurisdiction and confines itself to a review of the decision making process of the inferior body or tribunal. The exception arises in cases where these bodies in arriving at their decision have been guilty of procedural impropriety, illegality or irrationality. A fourth category, namely proportionality has been added to this. Following the decision of the Federal Court in the case *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd (supra)*, the previous distinction between review and appeal no longer holds. Thus, in assessing whether the decision making body has run foul in arriving at their decision under any of these headings, the court invariably enquires into the merits and substance of such decisions. (para 22)

**(3)** The orders of a superior must be obeyed if they are lawful and reasonable. The employee cannot disobey or refuse to follow orders of a superior no matter even if they entertain a subjective perception that such order is plainly wrong. Such a duty is a fundamental obligation which is deemed to be implied in a contract of service. A disobedience to superior orders is thus seen as so fundamental as to strike at the very root of the employment contract itself rendering it incapable of continued performance. The consequences of wilful disobedience are considered serious enough to justify summary dismissal. (paras 30 & 31)

**(4)** The accepted test in determining whether an employee should be dismissed for misconduct is whether it is reasonable for the employer to dismiss the employee. In applying this test, all the circumstances must be looked at and considered including the conduct of the employee after the offence was established to determine if remorse was shown. There is no rule set in stone that it would be unreasonable to dismiss for a single instance of misconduct and the nature of the misconduct must be considered. (para 36)

**(5)** The fact that it is now well within the province of the Industrial Court to consider the proportionality of punishment or harshness in relation to the misconduct is now beyond question given the pronouncement of the apex court in the case of *Norizan Bakar v. Panzana Enterprise Sdn Bhd*. However, the test of the reasonable employer as propounded in *British Leyland (UK) Ltd v. Swift* in respect of private sector employees has not been overruled. The test of what a reasonable employer would do or the reasonable employer test in respect of whether to dismiss an employee for misconduct as enunciated in *British Leyland* has not been overruled by the decision in *Panzana*'s case. (paras 37 & 43)

**(6)** Had the second respondent taken into consideration all the instances of insubordination committed by the first respondent, it would have found that the cumulative effect of all the instances of insubordination leading to her behaviour being more and more brazen as time went by was sufficiently grave misconduct and sufficient to justify termination under the circumstances. (para 44)

**(7)** Following the principle established in the *British Leyland*'s case, the conduct of the employee after the incident must also be considered. Here, there was no evidence of remorse shown by the first respondent. This again was a relevant consideration that was not taken into account by the second respondent in coming to his decision that the misconduct did not justify termination. (para 45)

**(8)** The first respondent was occupying a very senior post in the organisation. Her acts of insubordination effectively meant that that there was a complete breakdown in the reporting hierarchy in the organisation. (para 47)

**(9)** The second respondent had failed to take into account relevant matters in coming to its decision that the misconduct did not justify termination. The decision of the second respondent was a decision that no reasonable tribunal similarly circumstanced would have arrived at and was therefore unreasonable in the "*Wednesbury*" sense. *Certiorari* therefore lay to quash the decision. (para 51)

**Case(s) referred to:**

*Ambank (M) Bhd v. Menteri Sumber Manusia & Anor and Other Appeals [2014] 1 LNS 686 CA* ***(refd)***

*British Leyland (UK) Ltd v. Swift [1981] IRLR 91* ***(foll)***

*Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent [1985] AC 374* ***(refd)***

*Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2014] 8 CLJ 821 FC* ***(refd)***

*Kurnia Insurans (Malaysia) Bhd v. Clara Tai Saw Lan & Anor [2000] 1 CLJ 518 HC* ***(refd)***

*Laws v. London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285* ***(refd)***

*Lim Eye Thun v. Majlis Peguam Malaysia & Anor [2010] 2 CLJ 45 CA* ***(refd)***

*Menon v. The Brooklands (Selangor) Rubber Co Ltd [1968] 1 LNS 77 FC* ***(refd)***
*Menon v. The Brooklands (Selangor) Rubber Company Ltd [1967] 1 LNS 100 HC* ***(refd)***
*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA* ***(refd)***
*Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837 FC* ***(refd)***
*Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC* ***(foll)***
*Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik [2002] 1 CLJ 181 FC* ***(refd)***
*R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***
*Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC* ***(foll)***
*Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC* ***(refd)***
*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***
*Tenby World Sdn Bhd v. Soh Chong Wan & Anor [2013] 10 CLJ 822 HC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 25(2)
Industrial Relations Act 1967, ss. 20(1), 30(4)
Rules of Court 2012, O. 53 r. 2(2)
Specific Relief Act 1950, s. 44

*For the applicant - Ajit Singh Jessy (Pravin Kaur Jessy with him); M/s Jessy & Assocs*
*For the respondent - Eric Cheah; M/s Hong, Cheah & Co*

*Reported by Amutha Suppayah*

## JUDGMENT

**Collin Lawrence Sequerah JC:**

### The Application Before The Court

**[1]** The applicant company by way of this application for judicial review seeks to quash through *certiorari* the decision made by the second respondent given on the 7 May 2014 in the first respondent's favour.

### Facts Of The Case

**[2]** The background facts leading to this application were as follows. The first respondent commenced employment with the applicant on the 1 November 1989. She was instrumental in setting up the company with its headquarters in Penang and the branch office in Kuala Lumpur. The company is part of a multi-national corporation by the name of TUI Travel and is listed on the London Stock Exchange.

**[3]** At the time of her dismissal, the first respondent was the Regional General Manager for Malaysia and Brunei. She was also a director of the company and was paid director's fees. On the 30 December 2009, the first

A respondent was summarily dismissed from her employment *vide* a letter of even date. The reason given was for insubordination to orders given by her superior.

**[4]** The alleged act of insubordination as contained in the said letter dated 30 December 2009 read as follows, "we wish to reiterate the reason for the B termination of your service, ie, due to your blatant and outright refusal to report to and obey the instructions of your supervisors, the Regional Director, Mr Manuel Ferrer, and the Managing Director of Asia, Mr Jacques Arnoux.

**[5]** *Vide* your email dated 23 November 2009, addressed to Mr Carlos C Munoz, you informed Mr Carlos Munoz, the Managing Director of the Division:

> Meantime, as I said, I won't report to Manual Ferrer, so, what to do next?

**[6]** Your refusal to report to the Managing Director makes it impossible to retain you in the service of the company and thus the decision to issue you D the said termination notice. Amongst others, the most fundamental implied duty of an employee, is to obey the lawful orders of the superior and your refusal to report to the regional and managing directors, is clearly a breach of the said fundamental duty.

E **[7]** In the statement in reply to the first respondent's claim at the Industrial Court, the applicant gave the three main reasons for the dismissal which were as follows. Firstly, the contents of the first respondent's email dated 23 November 2009, addressed to a Mr Carlos, stating:

> Meantime, as I said, I won't report to Manual Ferrer, so, what to do next?

F **[8]** Mr Manuel Ferrer, the superior to whom she refused to report, was the Regional Director for Singapore, Malaysia and Indonesia and the Regional Manager for Singapore, where the regional office was situated.

**[9]** The second instance was when Mr Manuel Ferrer, the regional director, had directed the first respondent to make a payment for a company G related expense which she refused to do.

**[10]** The said regional director, who was the Regional Director for Singapore, Malaysia and Indonesia and Regional General Manager for Singapore, in reply wrote an email to claimant dated 28 September 2009, stating:

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> It is hard to believe what I read in this email and the subsequent one to PW Thailand. I will try to be clearer. PAY IT. It is an order ...

**[11]** To this the first respondent replied:

> Sorry. I cannot agree

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**[12]** The third instance occurred *vide* an email dated 19 October 2009, in respect of the matter of final budget 2009/10 adjustments and the above payment, where the first respondent wrote:

> As I have spoken and written on the above 2 matters, I will not repeat myself again on the reason(s) of my disagreement.

**[13]** Subsequent to her dismissal, the first respondent made a representation for reinstatement pursuant to s. 20(1) of the Industrial Relations Act 1967 (IRA). Conciliation attempts having failed, the matter was reported to the Honourable Minister for Human Resources who then referred the matter for adjudication to the Industrial Court (second respondent).

**[14]** The second respondent, after having heard the matter, found that the first respondent had committed misconduct on a single ground of insubordination, namely, that arising from the contents of the first respondent's email dated 23 November 2009, addressed to the said Mr Carlos, stating:

> Meantime, as I said, I won't report to Manual Ferrer, so, what to do next?

However, the second respondent held that the punishment of termination from service was not proportionate under the circumstances and ordered payment of compensation and back wages instead. Rescaling of the amount however, was ordered by reason of contributory conduct on the part of the first respondent of 50%.

**[15]** The issue before this court is whether the second respondent had committed any error which would warrant its decision being quashed by *certiorari* when it held that the first respondent, though guilty of misconduct on grounds of insubordination, should not have been dismissed from her employment and accorded payment of compensation and back wages instead. Put another way, it is whether or not the decision to terminate by the applicant was disproportionate or too harsh in relation to the proven misconduct given all the circumstances.

## The Law On Judicial Review

**[16]** Before proceeding further it is necessary to set out in brief the powers vested in the High Court when considering applications of this nature.

*Powers Of The Court To Grant Judicial Review*

**[17]** It is well recognised that judicial review is that branch of administrative law by which the High Court exercises its supervisory, as opposed to its appellate powers over the decisions of inferior tribunals and statutory bodies. The powers vested in the High Court in this country to grant

judicial review derives from the Specific Relief Act 1950 and the Courts of Judicature Act 1964 (CJA 1964) in particular para. 1 of the Schedule to s. 25(2) CJA 1964. This vests the High Court with power to issue to any person of authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In an application for judicial review of a decision of an inferior tribunal or statutory body, the court may make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or *quasi*-judicial authority with the intention of restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular actor duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or *quasi*-judicial authority in respect of proceedings before them. The applicable procedure that governs applications for judicial review is contained in O. 53 of the Rules of Court 2012 (ROC 2012). An application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012).

*The Grounds Upon Which Administrative Action Is Subject To Control By Judicial Review*

**[18]** The traditional position of the law on judicial review is that the remedy is not concerned with reviewing the merits of the decision in which the application for judicial review is made. The remedy of judicial review is primarily a review of the decision making process. In judicial review hearings, the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. See *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305 which held as follows:

> First and foremost, it must be emphasised that in an application for *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself.

**[19]** The grounds upon which administrative action is subject to control by judicial review has however been widened. In the celebrated case of *Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent* [1985] AC 374, Lord Diplock said as follows:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further

development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury unreasonableness*" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to *Viscount Radcliffe*'s ingenious explanation in *Edwards v. Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

**[20]** In our jurisdiction, the landmark decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; [1997] 1 AMR 433 stated in no uncertain terms that the court's review is not confined to process but also substance. The Federal Court case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] MLJU 686 further underscored this position where it was held:

Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our Courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits

A the courts to scrutinise the decision not only for process but also for substance. It allowed the Courts to go into the merit of the matter. **Thus, the distinction between review and appeal no longer holds.**

The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restraint decisions for substance even when the said decision is based on finding of facts. (emphasis added)

**[21]** A recent case which illustrates the province of a court when hearing applications for judicial review is the case of *Ambank (M) Berhad v. Menteri Sumber Manusia & Anor and Other Appeals* [2014] 1 LNS 686 where the Court of Appeal held:

29. The principles governing the approach to be taken in dealing with judicial review applications have been well and authoritatively laid down in a number of cases. Basically the court in such a context was to be mindful that it was not exercising appellate jurisdiction but merely considering whether to extend its 'curial intervention' pursuant to its supervisory jurisdiction (that is, over inferior tribunals or administrative or *quasi* judicial decision makers).

30. It has been accepted by the courts too that although as a matter of first principle judicial review was concerned primarily with the decision making process (not the merits, substance or justification), there was an exception to that rule where the court could still go behind the decision, where the allegations raised were to the effect that the decision maker had transgressed principles of procedural impropriety, illegality or irrationality (may be even proportionality) in arriving at the impugned decision.

In those circumstances it was open to the court to extend its scrutiny into the area of the merits or justification behind that decision.

**[22]** A review of the foregoing cases suggest that the court in cases of this nature exercises supervisory and not appellate jurisdiction and confines itself to a review of the decision making process of the inferior body or tribunal. The exception arises in cases where these bodies in arriving at their decision have been guilty of procedural impropriety, illegality or irrationality. A fourth category, namely proportionality has been added to this. However, following the decision of the Federal Court in the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* (*supra*), the previous distinction between review and appeal no longer holds. Thus in assessing whether the decision making body has run foul in arriving at their decision under any of these headings, the court invariably enquires into the merits and substance of such decisions.

**[23]** A useful summary of the description of these individual heads of challenge has been neatly and succinctly outlined in the case of *Tenby World Sdn Bhd v. Soh Chong Wan & Anor* [2013] 10 CLJ 822 by Vernon Ong J (as he then was) and I can do no better than reproduce *verbatim* what was said there in order to capture their essence:

Procedural Impropriety

[18] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of directs pecuniary interest (*B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] MLJ 69; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85 CA; *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390).

Illegality

[19] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and Anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur Gopal Singh v. Hotel Excelsior* [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by *mala fide*. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 AMR 2265).

Irrationality

[20] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the

A 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

B [21] A decision which falls on this ground is said to have failed the '*Wednesbury unreasonableness*' test (See *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng @ Tan Chee* C *Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*, (*supra*)).

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**The Law On Obedience To Superior Orders**

**[24]** The facts of the case as outlined earlier reveal that the misconduct alleged by the applicant against the first respondent was that of insubordination which eventually also constituted the grounds upon which E the first respondent's services were summarily terminated. The consequence upon a finding of insubordination as misconduct has been the subject matter of discussion in quite number of cases. In the case of *Menon v. The Brooklands (Selangor) Rubber Company Ltd* [1967] 1 LNS 100; [1968] 1 MLJ 15, the misconduct was an outright refusal of an employee in signing a copy of an F acknowledgement letter of warning. In holding that the employee was guilty of misconduct, the court speaking through Raja Azlan Shah (as His Majesty then was) said:

> It is well-established law that wilful disobedience of a lawful and reasonable order of the employer will justify summary dismissal. It is also G axiomatic that one act of disobedience or misconduct can justify instant dismissal if it is of a nature which goes to show that the servant is repudiating the contract or one of its essential conditions: see *Laws v. London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, 287, 288.

**[25]** The decision was upheld on appeal to the Federal Court, see *Menon v. The Brooklands (Selangor) Rubber Co Ltd* [1968] 1 LNS 77; [1968] 2 MLJ H 186, where it was held:

> ... in this case the contumacious manner in which the appellant refused to obey instructions to see the manager of the estate went beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and employee and I effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position.

**[26]** The case of *Menon* was followed by the High Court in the case of *Kurnia Insurans (Malaysia) Bhd v. Clara Tai Saw Lan & Anor* [2000] 1 CLJ 518 where it was held that an employee is bound to obey a lawful command of an employer and failure to do so is misconduct that justifies summary dismissal.

**[27]** In *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181, the Federal Court, in drawing from established and reputable literature on the subject of the duty to obey superior orders provided the rationale for such adherence as follows:

> [1] *It is generally held that the proper course for an employee is to obey the orders when it is given and protest about its illegality in separate proceedings. The distinction is made on the basis that if a worker is allowed to judge the legality of every order and to disobey it if he thinks it is not legal, it would be impossible for the management to get the work done.* If an employee takes upon himself to disobey an order which he thinks not lawful or unreasonable, two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried, he can do the work and take up the matter with the union. If he disobeys he must take the risk, if the court finds that the order was lawful and reasonable. When a worker refuses to comply with the instructions of his superiors and his defence is that he wants to verify whether the order is approved by the Manager, this amount to insubordination and dismissal is justified. This principle also applies to transfer orders. (BR Ghaiye on *Misconduct in Employment*). (p. 197 d-g)
>
> [1a] **If an employee tries to disobey an apparently lawful order on the ground of illegality it will be difficult for the management to maintain discipline and industrial peace.** It is the duty of the employee to first obey the order and then challenge it (BR Ghaiye on *Misconduct in Employment*). (p. 197 g) (emphasis added)

**[28]** It is implicit from the decision of the Federal Court that the reason for an employee obeying superior orders is one of common sense and expediency in the smooth functioning of the organisation. This obligation even extends to an order that the employee might subjectively perceive to be illegal.

**[29]** In the case of *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/ Landmarks Holding Bhd* [2006] 3 CLJ 837, the Federal Court reviewed the earlier authorities including *Menon* and held as follows:

> [28] *In Malaysia, the general rule governing the doctrine of superior orders is nothing more than the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders.* The classic modern statement of that duty is found in the judgment of Lord Evershed MR in *Laws v. London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 to be as follows.

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> *It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service namely the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.*

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[29] *Working as instructed is the employee's basic consideration under a contract of employment just as providing remuneration is the basic consideration of his employer. However the employee's duty to comply is confined to all the lawful and reasonable orders of his employer in respect of the performance of such functions that falls within the scope of his contract of employment.* Whether the employer's orders are C lawful and reasonable would depend very much on the terms and conditions of the contract and the character of employment. The term "lawful and reasonable order" is often used to describe the order given and in this context it means primarily an order which is reasonably within the ambit of the employment in question so that, in any given dispute much or all will depend on the terms of the individual contract of D employment. The employer thus cannot give an order outside the proper scope of the employment.

[30] One of the earliest cases dealing with the question of lawful and reasonable orders can be found in *Menon v. The Brooklands (Selangor) Rubber Co Ltd* [1967] 1 LNS 100 where Raja Azlan J (as he then was) had to deal E with the issue of the plaintiff's refusal to acknowledge receipt of a warning letter on a copy. The refusal was reported to the manager, who then directed the assistant manager to write to the plaintiff a letter instructing him to see the manager personally. This was done but the plaintiff refused to comply with such direction. The plaintiff was found guilty of misconduct in his employment in that he disobeyed the lawful and F reasonable order of the defendants. The footnote on the case had the following holding.

> Held: the refusal to acknowledge receipt of warning letter justified instant dismissal since it goes to the essential conditions of his contract of service which requires that he be a diligent and G responsible estate conductor. The conduct was inconsistent with his duty towards the master. It was inconsistent with the continued confidence between them essential to the relationship of master and servant.

[31] Further on appeal to the Federal Court [1968] 1 LNS 77. Pike CJ, in dismissing the appeal had this to say:

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> This, in addition to the contumacious manner in which he refused to obey the instruction to see the manager of the estate, went far beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and effectively destroyed the trust which must subsist in I any such relationship where the employee holds a responsible position.

[32] That same principle of law was followed in (1) *Oasis Milk Bar v. Lim Teng & Ors* [1962] 1 LNS 111, (2) *Vasudevan Pillai & Anor v. City Council of Singapore* [1965] 2 MLJ 51, (3) *Yong Yoke Sung & Ors v. Sungai Way Estate* [1965] 1 LNS 208; [1966] 1 MLJ 175 and (4) *C Paranthaman v. Sime Darby Berhad (Sime Darby Plantation)* [1994] 4 CLJ 532.

[33] *From the case law, it is clear that the duty of obedience is confined to compliance with the lawful and reasonable orders of an employer and as such the concept of an order being manifestly wrong has no part in the doctrine of superior orders.* To that extent the Court of Appeal erred when it made an exception to the general rule on superior orders when stating that an employee is entitled to disobey the orders of his superior if he, the employee, is aware that such orders are manifestly wrong. However that exception holds good in military or criminal law as seen from the case of *PP v. Tengku Mahmood Iskandar* [1973] 1 LNS 124; [1973] 1 MLJ 128 where it was held that a soldier is not protected where the order is grossly illegal.

[34] The duty of an employee at common law is also similar in that he is to comply with all lawful and reasonable orders given by his employer with respect to the performance of such functions within the scope of his employment. That duty is one of the fundamental obligations which is deemed to be impliedly undertaken in every contract of hiring. The duty of obedience at common law is subject to two qualifications, firstly that the employer may not order his employee to do something illegal or secondly order his employee to do anything dangerous. (emphasis added)

**[30]** From the reasoning adopted by the Federal Court, it is clear that the orders of a superior must be obeyed if they are lawful and reasonable. The employee cannot disobey or refuse to follow orders of a superior no matter even if they entertain a subjective perception that such order is plainly wrong. The Federal Court further held that such a duty is a fundamental obligation which is deemed to be implied in a contract of service. So fundamental is such a duty that even if the employee is caught up in a quandary as to whether a superior order is legal or otherwise, the Federal Court went on to say:

[35] *However it may well be that an employee is caught in the situation that he is required to obey an order and he is doubtful whether the order is legal or not. Under those circumstances the proper course is for the employee to obey the order first and to challenge its legality in separate proceedings. This distinction is made on the basis that if the law allows the employee to disobey any order he thinks is not legal, it would be impossible for the management to maintain discipline and industrial peace.* On the other hand, if the employee takes it upon himself to disobey the order which he thinks to be unlawful and unreasonable two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried out, he can do the work and take the matter further in proceedings against his employer or to complain to his union. If he disobeys, he must take the risk if the court finds the order to be lawful and reasonable. See the case of *Pan Global Textiles Berhad, Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181; [2002] 2 MLJ 27. (emphasis added)

**[31]** A disobedience to superior orders is thus seen as so fundamental as to strike at the very root of the employment contract itself rendering it incapable of continued performance. The consequences of wilful disobedience, as seen from the statement of the duty as encapsulated in the *London Chronicle*'s case referred to is considered serious enough to justify summary dismissal. The duty stated in *London Chronicle* found its way again, into the judgment of the Court of Appeal in the case of *Lim Eye Thun v. Majlis Peguam Malaysia & Anor* [2010] 2 CLJ 45 in relation to a charge of insubordination by an employee.

**[32]** The cases above have been referred to in order to discern the approach taken by courts in cases where insubordination is levelled at an employee. There is no doubt from the cases examined that such misconduct is so serious that it strikes at the very fundamental nature of the employment relationship itself warranting summary dismissal.

**[33]** Case law has also established that when it falls to be determined whether a particular misconduct justifies summary termination, the accepted test seems to be whether it was reasonable to dismiss the worker under all the circumstances of the case or the reasonable employer's test. This test is derived from the decision in the English case of *British Leyland (UK) Ltd v. Swift* [1981] IRLR 91, which held:

> **The correct test is was it reasonable of the employer to dismiss the employee?** If no reasonable employer would have dismissed him, then the dismissal is unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal is fair. *There is a band of reasonableness within which one employer might reasonably dismiss the employee whilst another would quite reasonably keep him on. It depends entirely on the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. If it was reasonable to dismiss, the dismissal must be upheld as fair even though some other employers might not have dismissed.* (emphasis added)

**[34]** The test in *British Leyland* has been adopted by the courts in Malaysia. In the case of *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646, the then Supreme Court held:

> We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Acker LJ in *British Leyland UK Ltd v. Swift* [1981] IRLR 91, 93. "An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special".

**[35]** More recently the Federal Court in *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 8 CLJ 821; [2014] 4 ILR 241, applied *British Leyland* in determining whether it was reasonable or not

to dismiss an employee. One of the factors considered there was the conduct of the employee after the offence was established in taking into account the reasonableness of the decision to dismiss. In so holding the court said as follows:

> The conduct of the appellants after the offence was established must be taken into account in deciding whether it was reasonable to dismiss them or not. In *British Leyland UK Ltd v. Swift* [1981] IRLR 91 at p. 93 Lord Denning said:
>
> > But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say. 'I am sorry; I made a mistake, I ought not to have done it. I will not do anything of the kind again'. He did not even tell the same story he told to the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is. Mr. Swift did not 'come clean' when he was found out. He put forward a wholly untruthful and accurate account'. That seems to me to be a most relevant consideration for the employers to take into account in deciding whether it was reasonable to dismiss him or not ...
>
> [43] With regard to the appellants' contention that the courts below did not take into consideration the fact that the appellants were all long standing employees of the bank with no past records of disciplinary problems, we agree with the appellants that this is one of the matters that ought to be taken into consideration in deciding whether it was reasonable to dismiss them or not. However, there is no fixed rule of law to suggest that it was unreasonable to dismiss employees with unblemished records for a single instance of insolence. It depends on the nature of the misconduct.

**[36]** It is clear from the foregoing that the accepted test in this country in determining whether an employee should be dismissed for misconduct is whether it is reasonable for the employer to dismiss the employee. In applying this test, all the circumstances must be looked at and considered including the conduct of the employee after the offence was established to determine if remorse was shown. It was also established that there is no rule set in stone that it would be unreasonable to dismiss for a single instance of misconduct and the nature of the misconduct must be considered.

### Effect Of The Federal Court Decision In *Norizan Bakar v. Panzana Enterprise Sdn Bhd* On The Reasonable Employer Test

**[37]** The fact that it is now well within the province of the Industrial Court to consider the proportionality of punishment or harshness in relation to the misconduct is now beyond question given the pronouncement of the apex

court in the case of *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409. The pertinent issue here, however, is how has this decision, if at all, affected the accepted and prevailing test of whether a reasonable employer would dismiss an employee who is found guilty of misconduct. Put differently, has the decision in *Panzana* gives any impact on the reasonable employer test in the light of the Federal Court pronouncement there that the Industrial Court could substitute its decision in the place of the decision of the employer for what it thought was the reasonable or proportionate punishment according to the circumstances of the case?

**[38]** In the course of submissions, learned counsel for the first respondent advanced the proposition that the decision in *Panzana* had the effect of overruling the test propounded in *British Leyland* (*supra*) in respect of private sector employees. This argument was apparently based on the dissenting judgment of NH Chan JCA in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 which adopted the reasonable employer's test as used in England and in particular the decision in *British Leyland* (*supra*). In *Panzana* the Federal Court had observed that the judgment of the Court of Appeal was a mirror of the dissenting judgment of NH Chan JCA in *Tan Tek Seng*. As it turned out, the Court of Appeal decision in *Panzana* was overruled by the Federal Court. In *Panzana* the Federal Court held, upon two questions being referred to it by the appellants, that the Industrial Court could substitute its own view as to what should be the appropriate punishment for an employee's misconduct for the view of the employer. It was also held that the doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act by virtue of Item 5 of the Second Schedule and therefore the Industrial Court was seized with jurisdiction to decide whether dismissal was too harsh in the circumstances in deciding an award. Although *British Leyland* was referred to, there is nothing in the judgment either explicitly or otherwise to suggest that it was overruled. In fact in the list of cases included in the report, *British Leyland* was listed as merely being referred to. The Federal Court took some pains in clarifying how the "reasonable employer's test" found its way into the dissenting judgment of NH Chan JCA in *Tan Tek Seng*. This is what they had to say:

> [23] Clearly from the above, the English Court of Appeal did not rule that the industrial tribunal or employment appeal tribunal cannot interfere with the decision of the company in dismissing Mr Swift. No doubt they had come out with the reasonable employer's test, but what concerned them most was that on the facts and circumstances, their Lordships were astonished as to how the industrial tribunal had come to a decision that the dismissal of Mr Swift was unfair, overlooking the vital aspects surrounding the dismissal. The industrial tribunal in considering the fairness or otherwise of the dismissal of Mr Swift had appeared to have concentrated exclusively on the mitigating factor affecting Mr Swift's dismissal and entirely disregarding the very serious breakdown in trust

which must have arisen from Mr Swift's persistence in a lying explanation of his conduct. The Court of Appeal pointed out that the industrial tribunal had failed to direct its mind to all matters it should have taken into account, and their Lordships were convinced that had it done so it would have concluded that the dismissal of Mr Swift by the company was fair.

[24] It was on those facts and circumstances that the "reasonable employer's test" was propounded in *British Leyland* and later it found its way in the dissenting judgment of NH Chan JCA in *Tan Tek Seng*.

**[39]** It is thus clear from the above passage that the court in *British Leyland* had not gone so far as to rule that the industrial tribunal could never interfere with the decision of the employer in dismissing an employee. The Federal Court in *Panzana* further added:

[40] *As to what is the exact test to be used in deciding whether the proven misconduct constitutes a just cause or excuse for dismissal is a non-issue. Whether it is the reasonable employer's test as adopted by British Leyland or the reasonable man test as laid down by the Federal Court in Hong Leong Assurance, the Industrial Court's decision on that issue is always open to judicial review.*

[41] It is trite law that the decision of the Industrial Court is susceptible to judicial review on the grounds of "illegality", "irrationality", "procedural impropriety" and possibly "proportionality" under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). Decided cases after *Rama Chandran* had clearly established that where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, such findings are always amenable to judicial review (see *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79; *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 CLJ 288; *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 4 ILR 475). (emphasis added)

**[40]** It is therefore clear given the sentiments expressed above that the test of the reasonable employer as propounded in the *British Leyland*'s case in respect of private sector employees has not been overruled. In fact in the *Panzana*'s case itself which concerned an employee engaged in the private sector, the court found as a matter of fact and in all the circumstances that the misconduct was not minor and that the Industrial Court had failed to direct its mind to all the matters it should have taken into account and that the dismissal of the employee there was fair and not unfair.

**[41]** I am further fortified in my expressed views by the subsequent decision of the Federal Court in *Hariyanto*'s case (*supra*) which held as follows:

[37] In *Panzana* the questions of law posed for court's determination were as follows:

A (a) whether the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an award under s. 20(3) of the Industrial Relations Act 1967.

B (b) Further and/or in the alternative whether the Industrial Court in exercising its function as stated in the paragraph above can rely on its powers under s. 30(5) of the Industrial Relations Act 1967 specifically based on the principle of equity, good conscience and substantial merits of the case.

C [38] The court answered the two questions posed in the affirmative. However, on the facts and circumstances of that case the appeal was dismissed.

[39] *As a result of the decision in Panzana the answer posed in the instant appeal has also to be in the affirmative. However, that does not dispose of this appeal. We* D *have now to examine whether the decision of the Industrial Court that such misconduct did warrant a dismissal was a reasonable decision in the circumstances of the case*. (emphasis added)

**[42]** The court in *Harianto* further went to observe that remorse or lack of it post misconduct was also a relevant consideration in coming to the E decision on whether to dismiss an employee for misconduct. In doing so, the apex court relied on the observations of Lord Denning in *British Leyland*. It went on to observe that there is no fixed rule of law to suggest it was unreasonable to dismiss employees with unblemished records for a single instance of insolence, placing reliance on what was said by Lord Evershed F MR in *Laws v. London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at pp. 287 to 288 as follows:

In the present case, the learned judge, in the course of his judgment, said:

> It is clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious G nature.

Later he concluded, in the plaintiff's favour, that what she had done, or not done, on June 20, 1958, was not sufficiently grave to justify dismissal. With all respect to the learned judge, I think that his proposition is not justified in the form in which he stated it. I think that it is not right to H say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I I have read that the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.

**[43]** It is therefore clear beyond any doubt that the test of what a reasonable employer would do or the reasonable employer test in respect of whether to dismiss an employee for misconduct as enunciated in *British Leyland* has not been overruled by the decision in *Panzana*'s case.

**Analysis And Findings**

**[44]** It is clear from the applicant's statement of reply that there were three instances of insubordination pleaded. To reiterate they were, firstly, the outright refusal to pay a company related expense or claim, secondly, the refusal to adjust the budget and finally, the email expressing her ironclad intention that she would not report to Manuel Ferrer who was the first respondent's direct regional superior. From a perusal of the second respondent's award, it had merely outlined the evidence given on behalf of the applicant but in the process of the evaluation of the case had failed to address the issue of the first respondent's outright refusal to make payment for the company related expenses in coming to its finding that there was misconduct. The second respondent had thus failed to take into account this relevant consideration. This court also finds that in respect of the first respondent's refusal to comply with the budget issue, the second respondent had not given adequate consideration to the fact that as far as obeying superior orders, it is not the place of the first respondent to decide whether to follow or not to follow the orders. However, strongly the first respondent felt about the issue, she was bound to obey and later air her grievances through some other channel. The second respondent had therefore misapplied the established law relating to obedience of superior orders when it held that the budgetary issue had merely "sailed close to the wind of insubordination". The second respondent had also failed to take into account the fact that such orders in relation to profitability and efficiency were within the management's prerogative. Had the second respondent taken into consideration all the instances of insubordination committed by the first respondent, it would have no doubt found that the cumulative effect of all the instances of insubordination leading to her behaviour being more and more brazen as time went by was sufficiently grave misconduct and sufficient to justify termination under the circumstances.

**[45]** In addition to this and following the principle established in the *British Leyland*'s case, the conduct of the employee after the incident must also be considered. Here it is clear that there was no evidence of remorse shown by the first respondent. Even when she was asked to go on "garden leave", she did not proffer any apology for her intransigent attitude. This again was a relevant consideration that was not taken into account by the second respondent in coming to his decision that the misconduct did not justify termination.

**[46]** The law in relation to insubordination or of obedience to lawful and reasonable orders as established in the cases referred to above are clear. It is the duty of the employee to obey all orders which are lawful and reasonable. Insubordination strikes at the very root of the employment relationship and constitutes a fundamental breach of the employment contract. This duty to comply with superior orders is implied in every employment relationship. Although the second respondent had cited the relevant case law and established literature on the specific jurisprudential aspects of the duty of obedience to superior orders, it had failed to apply it to the facts in coming to its finding.

**[47]** It must be also borne in mind that the first respondent was occupying a very senior post in the organisation. At the time of her dismissal she was the Regional General Manager for Malaysia and Brunei. Her acts of insubordination effectively meant that that there was a complete breakdown in the reporting hierarchy in the organisation.

**[48]** Section 30(4) of the Industrial Relations Act 1967 reads as follows:

> (4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

**[49]** The Industrial Court in the making of its award should be mindful of the public interest and the financial implications of its award including the effect on the economy of the country. It would send out the wrong message especially to would be foreign investors that acts of defiance and insubordination on the part of its workers would be tolerated by an award of compensation even though the said employee is guilty of wilful insubordination. It would also not augur well for the economy of the country if those who intend to invest its resources here have to worry whether they will be unduly penalised and rendered out of pocket on account of a worker who is guilty of insubordination. The potential effect upon the economy is that investors may as well divert their resources to other jurisdictions. On any definition of the term, this would certainly not be in the public interest. The applicant in its pleadings and in its case before the second respondent had clearly advanced their reasons for the dismissal of the first respondent. While the second respondent had alluded to these reasons including the previous acts of insubordination in the course of rendering the award, it had failed to adequately give due consideration to all the instances of insubordination in coming to its decision that the misconduct did not warrant dismissal.

**[50]** This court is fully cognisant that based on the decision in *Panzana*, the Industrial Court has the jurisdiction to substitute its own view in respect of the degree of punishment in place of the employers' view. However, on the facts of the case, it is the finding of this court that had the Industrial Court

directed its mind to the cumulative acts of insubordination, it would have reached another conclusion which is that the dismissal of the first respondent was reasonable.

**[51]** The finding of this court therefore is that the second respondent had failed to take into account relevant matters in coming to its decision that the misconduct did not justify termination. It also follows from the above that the decision of the second respondent was a decision that no reasonable tribunal similarly circumstanced would have arrived at and was therefore unreasonable in the "*Wednesbury*" sense.

**[52]** *Certiorari* would therefore lie to quash the decision. The applicant's application is therefore allowed with costs.